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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. AJANI JAMAL AMOS, Defendant and Appellant.	F040992 (Super. Ct. No. SC083610A) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Jeffrey D. Firestone and Michelle L. West, Deputy Attorneys General, for Plaintiff and Respondent.

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After unsuccessfully moving to suppress evidence, appellant Ajani Jamal Amos pleaded no contest to possession of cocaine base for sale in exchange for a sentence of no

more than six years in prison. In addition, appellant admitted he had previously been convicted, in 1998, of conspiracy to commit assault with a firearm, but he reserved the right to contest the conviction's validity as a prior strike.

Before entering the plea in this case, appellant sought, by writ of coram nobis,[1] to set aside the 1998 conviction on the ground he had then pled no contest to the offense based upon his counsel's representation that, in the future, the offense would not be deemed a "strike" under California's Three Strikes Law (the Law). (Pen. Code § § 667, subd. (b)-(j), 1192.7, subd. (c) (1998 version).)[2] When appellant pled in 1998, conspiracy to commit assault with a firearm was not a "serious felony" or "strike" under the Law but, sometime after that 1998 conviction became final, California voters passed Proposition 21 (Cal. Const., art II, § 8, subd. (d), eff. March 8, 2000), which added conspiracy to commit assault with a firearm to the Law as a strike prior. (§ 1192.7, subd. (c) (31) & (41), as amended by Proposition 21, the Gang Violence and Juvenile Crime Prevention Initiative, Ballot Pamp., Primary Elec. (Mar. 7, 2000).) Appellant's coram nobis petition was denied.

At sentencing in the present case, the trial court refused to relitigate the issues raised in the coram nobis petition and refused to strike the prior 1998 conviction pursuant to section 1385. The court sentenced appellant to six years in prison -- the lower term of three years for possession of cocaine base for sale doubled as a result of the strike.

This is appellant's appeal from the judgment.

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1 The petition was titled "Writ of Error Coram Nobis, or In the Alternative, for Writ of Habeas Corpus." The trial court issued an order to show cause on the writ of coram nobis, and treated the petition as one for coram nobis. On appeal, appellant asks that we review the order as one denying a petition for coram nobis. We will.

2 All further references are to the Penal Code.

FACTS

On January 4, 2002, appellant was observed by two uniformed police officers loitering in a known high drug traffic area in the afternoon hours. In a period of 30 minutes, appellant remained at the same location and contacted three separate individuals. The officers did not see any type of exchange between appellant and the three individuals. Based on appellant's extended presence in the area, but without any knowledge that appellant was involved in narcotics as a user or trafficker, the officers approached appellant, who "seemed somewhat nervous at [the officer's] presence," and asked what appellant was doing in the area. One of the officers asked appellant for identification, which appellant provided. The officer, by a radio he had with him, called for a record check on appellant and returned the identification to appellant. The check revealed that appellant was on probation and subject to a search condition. This entire initial exchange took less than five minutes.

Based upon the probation condition, the officers detained appellant and proceeded to search his vehicle and his person. When marijuana was found in the car, appellant was arrested. During a later search at the jail, the officers saw a cellophane baggie protruding from appellant's rectum. A search warrant was obtained and a baggie containing cocaine base was extracted at a hospital.

DISCUSSION

I.

The trial court did not err by denying appellant's motion to suppress.

First, the officers' initial interaction with appellant was consensual.[3] The officers simply approached him, asked what he was doing in the area, and requested

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[3] The trial court found the initial contact with appellant was consensual and not prolonged. Implicit in this determination is a finding that the testifying officer was credible. We defer to the trial court's factual findings where, as here, they are supported by substantial evidence. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

identification, which appellant produced. They did not tell him they suspected he had committed a criminal offense, but they did tell him they were running a record check. This aspect of the entire encounter took no more than five minutes. There is no record evidence that the officers, by means of physical force or show of authority, restrained appellant's liberty to any extent. (*U. S. v. Mendenhall* (1980) 446 U.S. 544, 554 [circumstances establishing a seizure might include the presence of several officers, an officer's display of a weapon, physical touching, or use of language or tone of voice suggestion compliance is compelled].) Such a consensual encounter does not trigger the Fourth Amendment. (*Florida v. Bostick* (1991) 501 U.S. 429, 434 [only when officer uses physical force or show of authority in some way to restrain subject's liberty does a seizure occur]; *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216 [a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821 [consensual encounters do not require articulable suspicion that a person has committed or is about to commit a crime]; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1254 [defendant voluntarily handed driver's license to officer upon request; no detention]; *People v. Lopez* (1989) 212 Cal.App.3d 289 [police request for identification of man sitting on car in high drug area is not detention]; *People v. Bouser* (1994) 26 Cal.App.4th 1280 [asking questions, requesting identification and running warrant check does not amount to a Fourth Amendment intrusion].)

Second, the subsequent search of appellant's car and person did not violate the Fourth Amendment because the officers learned of the search condition during the consensual encounter. As a probationer subject to search, appellant did "'not enjoy "the absolute liberty to which every citizen is entitled"'" and held a significantly diminished reasonable expectation of privacy under the Fourth Amendment. (*U. S. v. Knights* (2001) 534 U.S. 112, 118, 120.) Thus, an officer may search a probationer subject to a known search condition without an individualized suspicion that the probationer has committed a crime. (*People v. Sanders* (2003) 31 Cal.4th 318; *In re Tyrell J.* (1994) 8 Cal.4th 68;

People v. Reyes (1998) 19 Cal.4th 743, 754 [even in the absence of particularized suspicion, a parole search condition does not intrude on any expectation of privacy society is prepared to recognize as legitimate].) We are obliged to follow the precedents set by the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II.

The trial court did not err by refusing to strike the 1998 prior conviction. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-531 [on appeal, the trial court's decision whether to dismiss strike priors is reviewed under the abuse of discretion standard]; *People v. Benevides* (1998) 64 Cal.App.4th 728, 735, fn. 7 [grounds for review are limited to whether the trial court held an erroneous belief that it lacked the authority to strike the priors, or that it arbitrarily and capriciously refused to dismiss a prior on the basis of "race, gender, religious beliefs" or other prohibited reasons]; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434 [same].)

In any event, the record does not support appellant's contention that the trial court refused to consider the facts and circumstances of the 1998 conviction. (See *People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 497.) The situation when the plea was made in 1998 was fully presented to the trial court at sentencing, by means of both oral and written argument. Although the trial court declined to reconsider the constitutional claims asserted by appellant in his earlier petition for coram nobis, nowhere in the record did the trial court say that it was not considering the circumstances of the 1998 conviction. In fact, the record establishes precisely the opposite because it affirmatively shows that the court expressly addressed the events relevant to the earlier conviction. The court said that it did not believe the conviction was invalid because at the time the representations were made by counsel they were correct and no one could have anticipated that the voters in California would subsequently change the law by initiative.

In addition, the record shows the trial court applied the appropriate criteria, including the nature of the strike offense, the nature of the current offense, and the proximity in time of the strike offense to the current offense, in evaluating the request to strike before denying appellant's motion.[4] (See *People v. Williams* (1998) 17 Cal.4th 148, 161 [court must consider whether, in light of the nature and circumstances of present felonies and prior serious and/or violent felony convictions, and the particulars of defendant's background, character, and prospects, the defendant may be deemed outside the scheme of California's Three Strikes Law].)

DISPOSITION

The judgment is affirmed.

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Dibiaso, Acting P.J.

WE CONCUR:

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Vartabedian, J.

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Cornell, J.

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[4] The court summed up its discussion of the relevant criteria by stating that "quite frankly, the Court feels that it would not be appropriate to strike the strike conviction because of the proximity of it in time [to] probationary status on the strike offense when he committed this offense and the seriousness of the underlying offense, not a violent felony by any stretch or a serious felony for that matter, under 1192.7, but conduct, as I've pointed out, that is, in this court's view, serious conduct and not something to be dealt with lightly. So the Court is going to deny the Romero request."